

The Appeals Board considered the record and adopted the stipulations contained in the award.

### ISSUES

What is the nature and extent of claimant's impairment?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the award of the Administrative Law Judge should be affirmed.

Claimant suffered accidental injury on April 22, 1996, when, while working as a truck driver for respondent, he was involved in an automobile accident. Claimant, while driving his truck, attempted to reach for a pen when he lost control of the vehicle and wrecked. Claimant suffered injury to his left jaw and the front of his chin. He received immediate medical attention from Western Plains in Dodge City, Kansas. X-rays were taken, and claimant was given pain medication and sent home for two days to let the swelling go down. He was later treated by Dr. Milford, who performed surgery on his jaw. The medical records of Dr. Milford are not part of the record.

Claimant was referred to Stephen D. Zeller, D.D.S., an oral and maxillofacial surgeon, for an independent medical examination by the Administrative Law Judge. Dr. Zeller examined claimant on May 3, 1999, preparing his initial report on June 8, 1999. Dr. Zeller's deposition was taken on August 16, 1999, and again on March 13, 2000. Dr. Zeller testified that, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, claimant would have no impairment from this injury. This was primarily based upon Dr. Zeller's understanding that claimant was having little difficulty chewing his foods. The Guides do not provide for an impairment if there is no nerve damage and no limitation to a person's diet. Dr. Zeller did testify that if there is some limitation to the diet, such as being limited to semi-solid or soft food, the percentage of impairment could be between 5 and 19 percent. In this instance, Dr. Zeller testified that claimant had not advised him at the time of the examination that he had any limitation in his ability to chew foods, although claimant mentioned that he had some difficulty eating steak. However, Dr. Zeller found it significant that three years after claimant's surgery, he continued to order and eat steak.

Claimant testified at regular hearing that he did have difficulties, at times, eating steak and chewing certain foods like lettuce or onions. Claimant testified that he advised the doctors of his ongoing difficulties.

Dr. Zeller rated claimant pursuant to The Journal of Craniomandibular Practice, an article provided to Dr. Zeller by claimant's attorney which he obtained from Dr. Koprivica. Dr. Zeller utilized this article after testifying that, in his opinion, the AMA Guides did not

address the temporomandibular joint (TMJ) problems. In utilizing the Journal, he opined claimant had a 25 percent permanent impairment to the body as a whole.

The Journal of Craniomandibular Practice was identified by Dr. Zeller in his second deposition of March 13, 2000. That particular publication was provided to Dr. Zeller through claimant's attorney who obtained it from Dr. Koprivica. That publication was authored by six dentists, all named in the article, although only two are actually identified with any specificity. It is not a part of the AMA Guides, but was created by the six dentists to be used in addition to the AMA Guides. At the time claimant attempted to introduce this journal, respondent objected based upon medical hearsay. None of the named authors were deposed.

The Administrative Law Judge, after reviewing the medical reports from Dr. Zeller and observing claimant testify, determined that Dr. Zeller's opinion that claimant had no impairment was the most persuasive. The Administrative Law Judge did not find credible claimant's testimony that he was, in some way, limited in his ability to chew.

The medical history in Dr. Zeller's report contains no indication that claimant was limited in his ability to eat steak. Had more detailed information been provided to Dr. Zeller at the time of the examination, it is possible a different opinion could have been reached by the Administrative Law Judge. However, medical opinions are based upon the information presented to the doctors. Doctors cannot assess impairments based upon speculation. In this instance, the Appeals Board finds that claimant has failed to prove that he suffered any permanent injury as a result of the accidental injury of April 22, 1996, and would, therefore, be limited to temporary total disability compensation and medical treatment pursuant to the award.

In addition, K.S.A. 1996 Supp. 44-510e states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

As noted by the Administrative Law Judge in the award, the AMA Guides do include Section 9.3b, that deals with "Dysfunction of the temporomandibular joint". Additionally, Table 6, page 9/231, provides permanent impairments for injuries which restrict a person's diet or ability to eat solid foods. Accordingly, Dr. Zeller's attempt to use The Journal of Craniomandibular Practice would be inappropriate. As the Guides do deal with temporomandibular joint injuries, the use of the Guides is mandated.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the award of Administrative Law Judge Pamela J. Fuller dated May 10, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

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**DISSENT**

I respectfully disagree with the majority's findings and conclusions.

First, I disagree with the majority's finding that claimant failed to tell Dr. Zeller that he was limited in any way from chewing foods. Conversely, the doctor's June 8, 1999, report specifically states that claimant complained of mild diet limitations secondary to popping and jaw sliding. Further, at the August 1999 deposition, the doctor agreed that claimant had pain while eating steak.<sup>1</sup>

Second, I disagree with the majority's conclusion that claimant has sustained no functional impairment. As a result of the work-related accident, claimant has a mildly dysfunctional left temporomandibular joint with chronic residual pain. The evidence is uncontroverted that the injury has caused claimant physiological loss as claimant is now restricted in his ability to open his mouth and in his ability to chew. The evidence is also

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<sup>1</sup> Deposition of Stephen D. Zeller, D.D.S., August 16, 1999; p. 20.

uncontroverted that the AMA Guides are woefully inadequate in quantifying the physiological loss that claimant has sustained.<sup>2</sup>

Based upon the above, I would consider Dr. Zeller's functional impairment rating using guides other than the AMA's and would grant claimant permanent partial disability benefits.

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BOARD MEMBER

c: Seth G. Valerius, Topeka, KS  
D. Shane Bangerter, Dodge City, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director

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<sup>2</sup> Deposition of Stephen D. Zeller, D.D.S., August 16, 1999; p. 11. Deposition of Dr. Zeller, March 13, 2000; pp. 8 and 9.